

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)

Preemption of Local Zoning Regulation)
of Satellite Earth Stations)

CS Docket No. 96-83

Restrictions on Over-the-Air)
Reception Devices; Television Broadcast)
and Multichannel Multipoint Distribution)
Service)

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To: The Commission

COMMENTS OF THE NATIONAL LEAGUE OF CITIES; THE NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS; THE NATIONAL TRUST FOR HISTORIC PRESERVATION; LEAGUE OF ARIZONA CITIES AND TOWNS; LEAGUE OF CALIFORNIA CITIES; COLORADO MUNICIPAL LEAGUE; CONNECTICUT CONFERENCE OF MUNICIPALITIES; DELAWARE LEAGUE OF LOCAL GOVERNMENTS; FLORIDA LEAGUE OF CITIES; GEORGIA MUNICIPAL ASSOCIATION; ASSOCIATION OF IDAHO CITIES; ILLINOIS MUNICIPAL LEAGUE; INDIANA ASSOCIATION OF CITIES AND TOWNS; IOWA LEAGUE OF CITIES; LEAGUE OF KANSAS MUNICIPALITIES; KENTUCKY LEAGUE OF CITIES; MAINE MUNICIPAL ASSOCIATION; MICHIGAN MUNICIPAL LEAGUE; LEAGUE OF MINNESOTA CITIES; MISSISSIPPI MUNICIPAL ASSOCIATION; LEAGUE OF NEBRASKA MUNICIPALITIES; NEW HAMPSHIRE MUNICIPAL ASSOCIATION; NEW JERSEY STATE LEAGUE OF MUNICIPALITIES; NEW MEXICO MUNICIPAL LEAGUE; NEW YORK STATE CONFERENCE OF MAYORS AND MUNICIPAL OFFICIALS; NORTH CAROLINA LEAGUE OF MUNICIPALITIES; NORTH DAKOTA LEAGUE OF CITIES; OHIO MUNICIPAL LEAGUE; OKLAHOMA MUNICIPAL LEAGUE; LEAGUE OF OREGON CITIES; PENNSYLVANIA LEAGUE OF CITIES AND MUNICIPALITIES; MUNICIPAL ASSOCIATION OF SOUTH CAROLINA; TEXAS MUNICIPAL LEAGUE; VERMONT LEAGUE OF CITIES AND TOWNS; VIRGINIA MUNICIPAL LEAGUE; ASSOCIATION OF WASHINGTON CITIES; AND WYOMING ASSOCIATION OF MUNICIPALITIES.

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COMMENTS OF THE NATIONAL LEAGUE OF CITIES, ET. AL.

The Local Communities¹ hereby submit their comments in response to the Commission's Notice of Proposed Rulemaking, CS Docket No. 96-83 (released April 4, 1996) ("NPRM"). In the NPRM, the Commission addresses Section 207 of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) ("Telecom Act"), which, in pertinent part, directs the

¹ The Local Communities is a coalition consisting of the National League of Cities, the National Association of Telecommunications Advisors and Officers; The National Trust for Historic Preservation; League of Arizona Cities and Towns; League of California Cities; Colorado Municipal League; Connecticut Conference of Municipalities; Delaware League of Local Governments; Florida League of Cities; Georgia Municipal Association; Association of Idaho Cities; Illinois Municipal League; Indiana Association of Cities and Towns; Iowa League of Cities; League of Kansas Municipalities; Kentucky League of Cities; Maine Municipal Association; Michigan Municipal League; League of Minnesota Cities; Mississippi Municipal Association; League of Nebraska Municipalities; New Hampshire Municipal Association; New Jersey State League of Municipalities; New Mexico Municipal League; New York State Conference of Mayors and Municipal Officials; North Carolina League of Municipalities; North Dakota League of Cities; Ohio Municipal League; Oklahoma Municipal League; League of Oregon Cities; Pennsylvania League of Cities and Municipalities; Municipal Association of South Carolina; Texas Municipal League; Vermont League of Cities and Towns; Virginia Municipal League; Association of Washington Cities; and Wyoming Association of Municipalities.

Commission to "promulgate regulations to prohibit restrictions that impair a viewer's ability to receive video programming services through devices designed for over-the-air reception of television broadcast signals [and] multichannel multipoint distribution service. . ."² The NPRM proposes a rule that, among other things, would presumptively preempt any local zoning, land-use, building, or similar regulation that "affects" the installation, maintenance, or use of television broadcast reception ("TVBR") antennas and multichannel multipoint distribution service ("MMDS") reception antennas.³ Pursuant to the Commission's proposed rule ("Proposed Rule"), the presumption may be overcome by a showing that the regulation is necessary to accomplish a clearly defined health or safety objective that is stated in the regulation, the regulation is specifically applicable to TVBR and MMDS antennas, and the regulation is not impermissibly burdensome.⁴

The Local Communities disagree with the Commission's tentative conclusions and with the Proposed Rule. On its face, Section 207 only authorizes rules that prohibit restrictions that actually impair receipt of TVBR and MMDS, and there is no evidence that any regulation that merely "affects" TVBR or MMDS devices necessarily impairs receipt of service. As we demonstrated in our Petition for Reconsideration in the Commission's satellite zoning preemption

² Telecom Act § 207.

³ NPRM at ¶¶ 7 and 8.

⁴ See NPRM at Appendix A, § (a)(2).

proceeding,⁵ the Commission's Proposed Rule, which is substantively identical to section (b) of the preemption rule the Commission adopted in the DBS zoning proceeding,⁶ is premised on a misreading of the statute and is without factual foundation. Additionally, the Proposed Rule is also unconstitutional, as it would require the Commission to intrude impermissibly into areas that are at the heart of local police power.

I. There is No Factual Basis -- And None Can Be Made -- To Support the Commission's Presumptive Preemption in Connection With Television Broadcast and MMDS Reception Antennas.

Section 207 authorizes the Commission to promulgate regulations to prohibit only those restrictions that actually "impair" a viewer's ability to receive television broadcast or MMDS services. Moreover, the legislative history of Section 207 makes clear that by "impair," Congress meant "prevent."⁷ In discussing Section 207 as it appeared in House Bill H.R. 1555,⁸ the House Report stated:

The Committee intends this section to preempt enforcement of State or local statutes and regulations, or State or local legal requirements, or restrictive covenants or encumbrances that prevent the use of antennae designed for off-the-air reception of television broadcast signals or of satellite receivers designed for receipt of DBS services. Existing regulations, including but not limited to,

⁵ Petition for Reconsideration of the National League of Cities, et. al., IB Docket No. 95-59, DA 91-577, 45-DSS-MISC-93 (filed April 17, 1996) ("Recon. Petition"). The arguments made in our Recon. Petition that are relevant to this proceeding are hereby incorporated into these comments by reference.

⁶ See Report and Order and Further Notice of Proposed Rulemaking, IB Docket No. 95-59, DA 91-577, 45-DSS-MISC-93 (released March 11, 1996).

⁷ H.R. Rep. No. 104-204, 104th Cong., 1st Sess. at 124 (1996) ("House Report").

⁸ Senate Bill 652 did not have a corresponding provision.

zoning laws, ordinances, restrictive covenants or homeowners' association rules, shall be unenforceable to the extent contrary to this section.⁹

The Proposed Rule strays far beyond the statutory language and legislative history of Section 207. It implicitly assumes -- without any factual basis whatsoever -- that any zoning, land-use, or building regulation that merely "affects" TVBR and MMDS antennas necessarily "impairs" a viewer's ability to receive over-the-air video programming signals and is therefore preempted. Such an assumption is illogical. As we demonstrated in our Recon. Petition of the Commission's rule preempting restrictions on small satellite antennas, there is no rational basis for concluding that every state or local regulation that merely "affects" a video programming reception device necessarily "impairs" a viewer's ability to receive over-the-air video programming signals via such a device.¹⁰ Such an assumption, if anything, is even more irrational when made in connection with TVBR and MMDS antennas.

The NPRM references no data, reports, or a record of consumer complaints -- indeed, it refers to no facts whatsoever -- to support its tentative conclusion that a presumptive preemption should be applicable to all regulations merely "affecting" TVBR and MMDS antennas. And in fact, it is difficult to see how any such record could possibly exist, particularly with respect to TVBR antennas.

⁹ House Report at 123-24 (emphasis added).

¹⁰ Recon Petition at 3.

The history of broadcast television and the virtually universal receipt of television broadcast signals by virtually all households nationwide conclusively refute the assumption upon which the Proposed Rule rests. There is no evidence that zoning, land-use or building regulations have impaired the reception of TVBR signals at all. To the contrary, the evidence shows that these regulations definitely do not impair reception of such signals. For example, as of January 1996 there were 97,484,900 households in the United States.¹¹ Ninety-Eight percent of those households (95,828,460) owned televisions.¹² Since it is only reasonable to assume that 98% of households would not have televisions unless they could receive service, there is no rational basis for assuming that local regulations impair television reception at all -- and certainly not on the widespread basis that the presumptive preemption approach necessarily presumes.¹³ Thus, the only relevant evidence demonstrates that to the extent that any local

¹¹ Television & Cable Factbook, Services Vol. 64 (1996), Nielsen Geographic regions Summary, TV Ownership by Regions and States, 1996 vs. 1960, at I-19.

¹² Id.

¹³ In many metropolitan areas, of course, the use of TVBR antennas may not be necessary due to the strength of the television broadcast signal. Moreover, although many television households subscribe to cable, it cannot rationally be presumed that all cable households are afflicted by local regulations impairing receipt of over-the-air signals. To the contrary, the Commission itself long presumed precisely the opposite in construing available off-air broadcast signals as effective competition under the original effective competition provision in the 1984 Cable Act. See Report and Order, MM Docket No. 84-1296, 50 Fed. Reg. 18,637 (1985), Memorandum Opinion and Order, MM Docket No. 84-1296, 51 Fed. Reg. 21,770 (1986), Second Report and Order, MM Docket No. 84-1296, 3 FCC Rcd 2617 (1988), and Report and Order and Second Further Notice of Proposed Rulemaking, MM Docket No. 90-4, 6 FCC Rcd 4545 (1991).

regulations impair the use of TVBR antennas, they must be the exception, not the rule, contrary to what the Proposed Rule assumes.¹⁴

Moreover, the Commission should take care in this proceeding not to lump local government and private restrictions together. To the extent that the industry commenters may point to examples of private restrictions or covenants allegedly interfering with MMDS or TVBR devices, such evidence says nothing about local governmental regulations at all. It therefore would provide no basis for a presumptive preemption with respect to local governmental regulations. Therefore, there is no rational basis for the blanket presumptive preemption of the Proposed Rule.

Given the fact that there appear to be few, if any, governmental impediments to the receipt of video programming signals via TVBR and MMDS antennas, the Proposed Rule cannot stand. Rather, the only rationally supportable rule would be one that preempts only those state and local regulations that "impair" a viewer's ability to receive video programming signals via a TVBR or MMDS antenna. Moreover, the preemption should not be presumptive since there is no evidence of a widespread problem in this area at all. Rather, any person who believes that the imposition or enforcement of a regulation impairs his or her ability to receive over-the-air or MMDS video programming signals should be required to petition the Commission or a court

¹⁴ While reliable information about MMDS is less easily obtained, the conclusion is the same. As an initial matter, the NPRM cites no evidence remotely suggesting that local government regulations impair reception of MMDS service. Absent such evidence, a blanket presumption approach with respect to MMDS would be just as indefensible as with respect to TVBR.

of competent jurisdiction, which should decide such matters on a case-by-case basis. The petitioner should have the burden of demonstrating that the regulation at issue actually impairs receipt of service, and once that burden is discharged, the local government would have the burden of showing that the regulation is necessary to accomplish a health, safety, or aesthetic objective and is narrowly tailored to accomplish that objective.

Given the millions of televisions in the United States that are connected to TVBR antennas, it is doubtful that many such complaints would be initiated. Moreover, such a regulatory scheme is consistent with the language of Section 207 and with Congress' intent as expressed in the legislative history.

The presumptive preemption approach of the Proposed Rule, in contrast, is not only inconsistent with Section 207, but would trigger a flood of local government petitions to the Commission just to enforce such basic health and safety requirements as the National Electrical Code and the BOCA building code. See Recon. Petition. There is simply no basis for creating such a bureaucratic morass at the Commission in the absence of any evidence that local regulations actually impair TVBR and MMDS reception on a widespread basis.

II. The NPRM Misconstrues the Meaning and Effect of Section 207 of the Telecommunications Act of 1996.

As alluded to above, the Proposed Rule goes far beyond Congress' intent as set forth in the language and legislative history of Section 207. It does so by preempting all state and local zoning, land-use or building regulations that merely "affect[]" the installation, maintenance or

use of TVBR and MMDS antennas, regardless whether such regulations "impair" reception of over-the-air video programming at all. Such a broad preemption is flatly inconsistent both with the language and legislative history of Section 207 and is thus contrary to law.¹⁵

Like the Commission's presumptive preemption rule affecting small satellite antennas, the Proposed Rule's impermissibly excessive breadth is not rehabilitated by accommodating local concerns via the rebuttable presumption in section (a)(2) of the Proposed Rule. This is true because, among other reasons, the Proposed Rule does not even allow the presumption to be rebutted by a showing that a particular regulation does not result in any impairment. Thus, even if a local government could demonstrate as a factual matter -- and indeed the opposing party conceded -- that a particular regulation does not "impair" viewers' ability to receive over-the-air video programming, that would not be relevant under section (a)(2) of the Proposed Rule.¹⁶ This structure cannot be squared with the language of Section 207.

III. The Proposed Rule Represents an Unconstitutional Usurpation of Local Police Power Unjustified by the Commerce Clause.

In the Recon Petition, the Local Communities demonstrated that the Commission's presumptive preemption of all local regulations "affecting" small satellite antennas represents an unconstitutional usurpation by the federal government of local police power. This is true because, first, the Commission's presumptive preemption rule intrudes into an area that is clearly

¹⁵ See our Recon Petition at 2-5 for a more thorough discussion of this issue.

¹⁶ Id. at 4-5.

at the heart of local police power -- local zoning, land-use, building and similar regulations. Second, because the Commission's rule preempts all local zoning and land-use regulations that merely "affect" the installation and use of reception devices, regardless whether the regulations substantially affect interstate commerce at all, the rule goes beyond the reach of the Commerce Clause.¹⁷

The Commission's Proposed Rule for TVBR and MMDS suffers from the same defects. The Proposed Rule similarly intrudes into the heart of local police powers and steps outside the bounds of federal regulation permitted under the Commerce Clause. Hence, the scope of the Proposed Rule should be narrowed to cover only those local regulations that actually impair a viewer's ability to receive over-the-air video programming. Only such a regulation could withstand scrutiny under the Commerce Clause.

IV. Conclusion.


The Commission's Proposed Rule suffers from the same defects and flaws as does its presumptive preemption of regulations affecting small satellite antennas. And given the virtually universal availability of television broadcast signals, the Proposed Rule is, if anything, even more irrational than the satellite zoning preemption rule. The Commission should therefore adopt a rule that prohibits only those restrictions that "impair a viewer's ability to receive video programming services through devices designed for over-the-air reception of television broadcast signals [and] multichannel multipoint distribution service" as directed by Section 207. Any party

¹⁷

See Recon Petition at 8-10.

believing a particular regulation violates this rule should be allowed to petition the Commission for preemption, with the burden on the petitioning party to prove the regulation impairs its ability to receive TVBR or MMDS service, and the burden on the state or local government to prove that the challenged regulation serves a health, safety, or aesthetic objective and is reasonably tailored to serve that objective.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Tillman L. Lay', written over a horizontal line.

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